Supreme Court, U.S.
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CASE NO. 85-1141
SUPREME COURT OF THE UNITED
STATES OF AMERICA
OCTOBER 1985 TERM

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE
OF FLORIDA,

PETITIONER,

VS.

SAND KEY ASSOCIATES, LTD.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
FLORIDA SECOND DISTRICT COURT
OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

SUPREME COURT OF THE UNITED STATES OF AMERICA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Petitioner,

vs.

SAND KEY ASSOCIATES, LTD.,

Respondent.

_____/

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Parties to the Proceeding Below

All parties to the proceeding before the Florida Second District Court of Appeal, from whose judgment review is sought, are listed in the caption to this Brief.

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References to Reports of Opinions Below

Sand Key Associates, Ltd. accepts the References to Reports of Opinions Below filed by the State, but would go further and point out that on October 29, 1985, the Florida Second District Court of Appeal, on rehearing, withdrew its October 4, 1985 opinion and substituted its January 29, 1986 opinion. The opinion may be found at the Appendix to this Petition, at page 13.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to entertain the Petition for Writ of Certiorari filed by the State. The October 4, 1985 opinion from which review was sought has been withdrawn, and a new opinion substituted therefor on rehearing. Review of the January 29, 1986 opinion is available in the Florida Supreme Court, and therefor there is no final judgment "rendered by the highest court of a State in which a decision could be had ...", as required by 28 U.S.C. §1257. The Petition for Writ of Certiorari was filed prematurely by the State, and this Court should deny that Petition.

ARGUMENT

This Court lacks jurisdiction to entertain the Petition for Writ of Certiorari filed by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (hereinafter the "State"), because the decision of the Florida Second District Court of Appeal entered on October 4, 1985 is not a judgment "by the highest court of a State in which a decision could be had ...", as required by 28 U.S.C. §1257. The State timely moved for a "Rehearing En Banc" of that decision. On January 29, 1986, the Florida Second District Court of Appeal, treating the Motion for Rehearing En Banc as a Motion for Rehearing, withdrew the October 4, 1985 decision, and substituted a new opinion therefor. (Appendix, p. 11). The January 29, 1986 opinion (Appendix, p. 13)

also affirmed the trial court's judgment, but significantly, certified a question to the Florida Supreme Court as one of great public importance.

Based on the certified question in the January 29, 1986 decision, the Florida Supreme Court has discretionary jurisdiction to hear a Petition for Review of the Florida Second District Court's decision. Art. V, §3(b)(4), Florida Constitution. On February 27, 1986, the State filed a Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court (Appendix, p. 19). Although the Florida Supreme Court would not have had jurisdiction to review the October 4, 1985 decision, see Jenkins v. State, 385 So.2d 1356 (Fla. 1980), it may review the January 29, 1986 decision of the Florida Second District Court of Appeal.

The Petition for Writ of Certiorari was filed during the pendency of a Motion for Rehearing, and therefor has no effect. Cf. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), holding that a notice of appeal filed prior to the disposition of a motion for rehearing has no effect. Accordingly, because review in the Florida Supreme Court is available to the State, the decisions of the Florida Second District Court of Appeal are not judgments "rendered by the highest court of a state in which a decision could be had ...", this Court lacks jurisdiction over the Petition for Writ of Certiorari. 28 U.S.C. §1257. The Petition for Writ of Certiorari was premature, because the October 4, 1985 Judgment was not "final". See Communist Party v. Whitcomb, 414 U.S. 441 (1974).

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because the Petition was premature, and there is not a judgment "rendered by the highest court of a State in which a decision could be had ...", to review by Petition for Writ of Certiorari.

Respectfully submitted,

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BY:_____
Richard J. Salem, Esq.

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IN THE SECOND DISTRICT
COURT OF APPEAL
LAKELAND, FLORIDA

JANUARY 29, 1986

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellant,

vs.

SAND KEY ASSOCIATES, LIMITED,

Appellee.

Upon consideration of appellant's motion for rehearing en banc, treated as a motion for rehearing, the motion is granted to the extent that the original opinion issued herein on October 4, 1985, is hereby withdrawn and the attached opinion is substituted therefor; otherwise the motion is denied.

The motion to strike filed by appellee is denied.

A TRUE COPY

ATTEST:

WILLIAM A. HADDAD

CLERK, DISTRICT COURT OF APPEAL

SECOND DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellant,

vs.

SAND KEY ASSOCIATES, LIMITED,

Appellee.

Opinion filed January 29, 1986.

Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge.

Steve A. Been, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellant.

Richard J. Salem and David J. Tong of Richard J. Salem, P.A., Tampa, and William J. Kimpton of Dunbar, Kimpton, Burke, Boyer, Roman and Schafer, Clearwater, for Appellee.

DANAHY, Acting Chief Judge.

This is the second appearance here of a dispute between the parties over the ownership of certain accreted lands abutting the gulf-front upland property of Sand Key Associates, Limited (Sand Key). When the case was first here, we reversed the partial summary judgment entered on Count I in favor of the appellee (State). Sand Key Associates, Ltd. v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2d DCA 1984) (Sand Key I). The effect of our reversal was to quiet title to the accreted land in Sand Key. In doing so, we held that Florida Statute 161.051 1/ was constitutional but did not apply here since the public project which caused the accretion was not done on Sand Key's

property. However, recognizing that the legislative intent of section 161.051 was not clear, we certified the following question to our supreme court as one of great public importance:

> PURSUANT TO SECTION 161.051, FLORIDA STATUTES (1981), IS THE STATE ENTITLED TO ACCRETED LAND OF ONLY THE UPLAND OWNER OF THE IMPROVED PROPERTY OR TO THE ACCRETED LAND OF ALL UPLAND LITTORAL OWNERS, WHETHER OR NOT THEY PARTICIPATED IN OR CONTRIBUTED TO THE IMPROVEMENT?

The supreme court has accepted jurisdiction. (Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., No. 66,372.)

Subsequent to our disposition of Sand Key I, the trial court entered a final summary judgment on Count II of Sand Key's amended complaint. That judgment is before us for review (Sand Key II). In Sand Key I, the judgment under review contained a

finding that Count II was a distinct and separate cause of action. Count II requires an answer to the question whether federal or state law determines the title to accreted lands where the littoral upland owner, as Sand Key is here, derives its title from a federal patent. The trial court, answering that question, ruled that federal law controls and that, consequently, Sand Key owned the accreted land. The result reached by the trial court in Sand Key II is consistent with the result reched by this court in Sand Key I.

We think the trial court reached the proper conclusion and we therefore affirm the judgment. Where title to oceanfront property is derived from a federal patent, federal law determines the extent of that title including title to all future accretions and all such accretions belong to the littoral landowner. See California

ex rel. State Lands Commission v. United States, 457 U.S. 273, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982), and Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967). The common law of this state is in agreement. Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. 2d DCA 1973).

While we do affirm the ruling of the trial court, we think our supreme court should have the advantage of the parties' arguments in this case to fully explore the important question already before the court in Sand Key I if it so chooses. Therefore, we certify the following further question to the supreme court as one of great public importance:

> DOES THE ANSWER TO THE QUESTION POSED IN SAND KEY ASSOCIATES, LTD. v. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, 458 So.2d 369

(Fla. 2d DCA 1984), DEPEND UPON WHETHER THE TITLE OF ANY UPLAND OWNER IS TRACEABLE TO A FEDERAL PATENT?

LEHAN and HALL, JJ., Concur.

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1. Section 161.051 provides:

> Coastal construction by persons, firms, corporations, or local authorities.-Where any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person, firm, corporation, county, municipality, township, special district, or any public agency where located, and shall thereafter be maintained by and at the expense of said person, firm, corporation, county, municipality, township, special district, or other public agency. No grant under this section shall affect title of the state to any lands below the mean high-water mark, and any additions or accretions to the upland caused by the erection of such works or improvements, or for any damages arising out of construction, reconstruction, maintenance, or repair thereof, or otherwise arising on account of such works or improvements.

IN THE DISTRICT COURT
OF APPEAL OF THE SECOND
DISTRICT OF FLORIDA.

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendant, Petitioner

vs.

SAND KEY ASSOCIATES, LIMITED,

Plaintiff, Respondent

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that the Board of Trustee of the Internal Improvement Trust Fund of the State of Florida, Defendant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered January 29, 1986. The decision passes on a

question certified to be of great public importance.

STEVEN A BEEN
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Tallahassee, FL 32303
(904) 488-9223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing Notice has been furnished by U.S. Mail to RICHARD SALEM, Esquire, Post Office Box 339, Tampa, Florida 33601 this 26th day of February, 1986.

STEVEN A BEEN

AFFIDAVIT OF SERVICE

RICHARD J. SALEM, being duly sworn, deposes and says:

On March 7, 1986, I deposited three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in a United States Post Office in Tampa, Florida with first class postage prepaid, addressed to Kevin X. Crowley, Counsel of Record, General Counsel, Florida Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303.

_____
Richard J. Salem

SWORN TO and subscribed before me this 7th day of March, 1986.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES: